No. 14-462

IN THE

Supreme Court of the United States

DIRECTV, INC.,

Petitioner,

v.

AMY IMBURGIA, ET AL.,

Respondents.

On Writ of Certiorari to the California Court of Appeal, Second Appellate District

BRIEF *AMICI CURIAE* OF ATLANTIC LEGAL FOUNDATION AND THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER

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June 5, 2015

QUESTION PRESENTED

Whether the California Court of Appeal erred by holding that a reference to state law in an arbitration agreement requires the application of state law preempted by the Federal Arbitration Act when another provision of the agreement specifically provides that the arbitration is governed by the Federal Arbitration Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, *amici curiae* Atlantic Legal Foundation and International Association of Defense Counsel state the following:

Atlantic Legal Foundation is a not for profit corporation incorporated under the laws of the Commonwealth of Pennsylvania. It has no shareholders, parents, subsidiaries or affiliates.

The International Association of Defense Counsel is a non-profit professional association. It has no parent company and no shareholders.

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INTEREST OF *AMICI CURIAE*[1]

The Atlantic Legal Foundation is a non-profit public interest law firm founded in 1976 whose mandate is to advocate and protect the principles of less intrusive and more accountable government, a market-based economic system, and individual rights. It seeks to advance this goal through litigation and other public advocacy and through education. Atlantic Legal Foundation's board of directors and legal advisory committee consist of legal scholars, corporate legal officers, private practitioners, business executives, and prominent scientists. Atlantic Legal's directors and advisors are familiar with the role arbitration clauses play in the contracts entered into between companies and between companies and consumers. Some of Atlantic Legal's directors and advisers have decades of experience with arbitration – as legal counsel, as arbitrators, and as members or

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[1] Pursuant to Rule 37.2(a), all parties have consented to the filing of this brief. The consents have been lodged with the Clerk.

Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* nor their counsel made a monetary contribution to the preparation or submission of this brief.

supporters of organizations that administer arbitration regimes. They are familiar with the benefits of arbitration, especially the role of arbitration (and other "alternative dispute resolution" mechanisms) in facilitating business and commerce and in alleviating the burdens on courts and parties.

The International Association of Defense Counsel ("IADC"), established in 1920, is an association of approximately 2,500 corporate and insurance attorneys from the United States and around the globe whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, culpable defendants are held liable for appropriate damages, and non-culpable defendants are exonerated and can defend themselves without unreasonable cost. In particular, the IADC has a strong interest in the fair and efficient administration of class actions as well as arbitrations, both of which are increasingly global in reach.

The abiding interest of *amici* in the benefits of arbitration is exemplified by its participation as *amicus* and as counsel for *amici* in *American*

Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013).

Amici believe that the decision of the California Court of Appeal in this case is inconsistent with the purposes of the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* ("FAA") and both the long-standing and recent teaching of this Court regarding arbitration and the effect of the FAA on state law. *Amici* believe that the California court ignored the preemptive effect of federal law. The decision below will deter many companies from incorporating arbitration as a dispute resolution mechanism in their commercial dealings, thus frustrating a fundamental purpose of the FAA.

PRELIMINARY STATEMENT

This case arises from a consumer class action against DIRECTV. Inc., a provider of satellite television services in California and elsewhere, brought by customers who reside in California on behalf of themselves and a class of all other DIRECTV customers in California. (California Complaint, JA53). Plaintiffs allege that DIRECTV engages in a policy and practice of enforcing an alleged contractual obligation against its customers to purchase DIRECTV's services for a specified period of time, typically 18 or 24 months, by imposing an early cancellation penalty on

customers who discontinue receiving DIRECTV's services before the expiration of the term of the Customer Agreement (JA58), and that "[t]he early cancellation penalties bear no relation to the damage, if any, incurred by DIRECTV in connection with an early cancellation of the service." (JA58). Plaintiffs further allege that DIRECTV withdraws the early cancellation penalties and other amounts due directly from customers' bank accounts or credit cards, using account information provided by the customers when they first ordered DIRECTV (JA58).

Plaintiffs sought injunctive relief on behalf of all current and former DIRECTV customers who were charged or may be charged an early cancellation penalty and monetary relief on behalf of current and former DIRECTV customers who paid DIRECTV an early cancellation penalty. (JA59).[2] Plaintiffs subsequently moved for class certification, and the California trial court granted

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[2] The state court litigation proceeded at the same time as a multidistrict litigation proceeding in federal court involving similar claims. *See In re DIRECTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, 810 F. Supp. 2d 1060 (C.D. Cal. 2011). DIRECTV moved to stay plaintiffs' state court action pending the outcome of the multidistrict litigation, but the California state trial court denied the motion. *See* Pet. App. 3a.

the motion in part and denied it in part, certifying a class as to one of plaintiffs' theories but denying certification as to others. (Pet. App. 3a-4a).

The Customer Agreement between DIRECTV and its subscriber sets forth the parties' rights and obligations and explains the terms and conditions of subscribing to DIRECTV services. The Agreement is provided to subscribers at the outset of the relationship. (McCarthy Decl., JA107). Amendments or updates to the Agreement are provided to customers with periodic billing statements. (McCarthy Decl., JA107).

The DIRECTV Customer Agreement contains an arbitration provision that provides "any legal or equitable claim relating to this Agreement, any addendum, or your Service" will first be addressed through an informal process and,

> [I]f we cannot resolve a Claim informally, any Claim either of us asserts will be resolved only by binding arbitration. The arbitration will be conducted under the rules of JAMS that are in effect at the time the arbitration is initiated and under the rules set forth in this Agreement.

Customer Agreement § 9(b), JA128; *see also* Pet. App. 4a.

The Agreement also sets out "Special Rules" governing arbitration, including the following:

> Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities, or arbitrate any claim as a representative member of a class or in a private attorney general capacity. Accordingly, you and we agree that the JAMS Class Action Procedures do not apply to our arbitration. If, however, the law of your state would find this agreement to dispense with class action procedures unenforceable, then this entire Section 9 is unenforceable.

Customer Agreement § 9(c), JA128-29; *see also* Pet. App. 4a.

Section 10 of the Agreement contains provisions addressing several miscellaneous matters, including the following provision concerning "Applicable Law":

> The interpretation and enforcement of this Agreement shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you. This Agreement is subject to modification if required by such laws. ***Notwithstanding the foregoing, Section 9 shall be governed by the Federal Arbitration Act.***

Customer Agreement § 10(b), JA141 (emphasis added); *see also* Pet. App. 5a. This case involves the interpretation of that arbitration provision.

After the parties entered into the Customer Agreement with the arbitration provision, this Court held that state law cannot force parties to arbitrate on a classwide basis when they have not agreed to do so. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

Shortly after this Court's decision in *Concepcion*, DIRECTV moved to stay or dismiss plaintiffs' state court action, decertify the class, and compel arbitration of plaintiffs' claims. (Pet. App. 4a). The California Superior Court denied that motion. The California Court of Appeal affirmed, relying on the proviso in the Agreement that stipulates that if the law of the state in which the customer resides would find unenforceable the agreement to dispense with class arbitration procedures, then the entire arbitration agreement will be unenforceable. The California appellate court held that the proviso reflects the parties' intent to rely on state law to nullify the arbitration agreement. The California Supreme Court summarily denied review. (Pet. App. 1a).

SUMMARY OF ARGUMENT

In the Customer Agreement, the parties agreed to resolve their disputes through arbitration, as opposed to litigation, and the parties agreed not to arbitrate on a classwide basis. The parties specifically agreed that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section 9 [the dispute resolution provision, including arbitration] shall be unenforceable." Customer Agreement § 9(c), JA128-29.

The decision of the California court below, based on a selective and contorted reading of the Agreement, negates the overriding federal policy of encouraging arbitration and enforcing arbitration agreements according to the intent of the parties. It does not heed this Court's recent teaching on the enforceability of arbitration agreements that "the overarching purpose of the FAA is to ensure the enforcement of arbitration agreements according to their terms" and to "facilitate streamlined proceedings." *Concepcion*, 131 S.Ct. at 1748. To this end, this Court held that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.*

The California Court of Appeal erroneously failed to give effect to the parties' agreement that

the FAA governs the arbitration provision. The state court also failed to properly give preemptive effect to the FAA as interpreted by this Court in the context of waivers of class arbitration. See *Rivers v. Roadway Express*, 511 U.S. 298, 312-13 (1994) (explaining that this Court's "construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.")

The court below refused to enforce the arbitration agreement according to its terms, and instead adopted a contorted interpretation that frustrates arbitration.[3] The California appellate court's holding that California law precludes class arbitration misapplies federal arbitration law and exemplifies the very "judicial hostility towards arbitration," which the FAA was intended to foreclose. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*); *Concepcion*, 131 S. Ct. at 1745, 1747, 1757; *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

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[3] Reasoning substantially similar to that of the California court has been characterized as "nonsensical," by the Ninth Circuit *Murphy v. DIRECTV, Inc.*, 724 F.3d 1218, 1226 (9th Cir. 2013).

The California Court of Appeal's decision is incompatible with the longstanding principle of federal law, embodied in the FAA, numerous precedents of this Court favoring the validity and enforceability of arbitration agreements, and federal preemption. This Court should reverse the judgment below.

ARGUMENT

I.

THE CALIFORNIA COURT OF APPEAL'S DECISION IS INCONSISTENT WITH THE FEDERAL ARBITRATION ACT AND THIS COURT'S TEACHING ON THE ENFORCEABILITY OF ARBITRATION AGREEMENTS

Amici urge this Court to reverse the California Court of Appeal's decision and to confirm its holdings in *Concepcion*, *Stolt-Nielsen* and other cases, which recognize the overriding Congressional policy favoring arbitration. This Court should make clear that this federal policy cannot be circumvented by contorted readings of contractual arbitration provisions and that lower courts cannot manipulate an arbitration clause to invalidate class arbitration waivers.

This Court has repeatedly held that the "fundamental principle [is] that arbitration is a matter of contract," *Concepcion*, 131 S. Ct. at 1745 (quoting *Rent-A-Center, West, Inc. v. Jackson*, 561

U.S. 63, 67 (2010)); *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681 (2010); *Volt Information Sciences, Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479 (1989) (*Volt*), and that courts must enforce arbitration agreements according to their terms, *Volt*, 489 U.S. at 478; *Stolt-Nielsen*, 559 U.S. at 682; *Concepcion*, 131 S. Ct. at 1748. The Court of Appeal's decision frustrates these principles and this Court's teaching that the FAA "embodies [a] national policy favoring arbitration," *Buckeye Check Cashing Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *see also, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Concepcion*, 131 S. Ct. at 1745. "[A]s a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Moses H. Cone*, 460 U.S. at 24-25 & n.32; *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985).

Here, the California Court of Appeal determined that "the parties' entire arbitration agreement is unenforceable, pursuant to the agreement's express terms, because the law of plaintiffs' state would find the class action waiver unenforceable." *See* Pet. App. 6a.

The California court paid lip service to the FAA's broad policy of enforcing arbitration agreements according to their terms, but found that because the parties "agreed to abide by state rules of arbitration, enforcing those rules is fully consistent with the goals of the FAA even if application of the state rules would yield a different result from application of the FAA." Pet. App. 6a-7a (citing *Volt*, 489 U.S. at 478-79) and a number of California state court decisions; other citations and internal quotes omitted).

In the California court's view, *Concepcion* did not hold that the FAA prohibits class arbitration, but only that "class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA." (*citing Concepcion*, 131 S.Ct. at 1751). Further, the Court of Appeal reasoned that, "if the FAA does not prohibit parties from agreeing to class arbitration itself," then "the FAA presumably does not prohibit them from agreeing that their agreement will be governed by state laws that are less hostile to class arbitration than the FAA." Pet. App. 8a, n.1. The Court of Appeal cited no authority for its presumptive corollary and *amici* submit that it is incorrect, because it ignores the principle of preemption, and violates the overarching purpose of the FAA. It also reads out of the agreement

Section 10, which explicitly states that the FAA governs the interpretation of Section 9.[4] The California court's decision is at odds with contemporaneous federal court interpretations of the very same arbitration provisions.

The California court acknowledged that *Concepcion* held that California law, including its *Discover Bank*[5] rule "is preempted by the FAA" to the extent it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," but then proceeded to create just such an "obstacle" by a tortured interpretation of the Customer Agreement. Pet. App. 10a.

The issue is not as complicated as the California court tried to make it. This Court held in *Concepcion* that the FAA preempts state laws that purport to require class arbitration where the parties have not agreed to it. *See Concepcion*, 131 S. Ct. at 1747-53. By agreeing that the arbitration provision, section 9 of the Customer Agreement, "shall be governed by" the FAA the parties to that

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[4] While the parties could have designated some law or rule other than the FAA to govern their arbitration agreement, they did not. They explicitly invoked the FAA, and there is no valid, nonpreempted, California law that invalidates the waiver of class arbitration.

[5] *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005).

agreement sought to prevent the application of state law inconsistent with the FAA, and not to rely on state law that "'creates a scheme inconsistent with the FAA.'" *Murphy v. DIRECTV, Inc.* 724 F.3d 1218, 1226 (9th Cir. 2013) (*Murphy*) (quoting *Concepcion*, 131 S. Ct. at 1748).

In *Murphy*, the Ninth Circuit decided a similar case concerning the enforceability of the same arbitration provision and class action waiver in DirecTV's customer agreement under *Concepcion*. That court held that "the arbitration agreement is enforceable under *Concepcion*," which preempts any state law to the contrary. 131 S. Ct. at 1228. The court reasoned that "the parties' various contract interpretation arguments" – which included both the argument that the specific reference to state law controlled over the general reference to the FAA and the argument that ambiguities should be construed against the drafter – "are largely irrelevant to our analysis," because under the Supremacy Clause of the United States Constitution, and the related doctrine of federal preemption, federal law *is* the law of every state. *Id.*; *see also* 131 S. Ct. at 1226 ("Section 2 of the FAA, which under *Concepcion* requires the enforcement of arbitration agreements that ban class procedures, *is* the law of

California and of every other state.") (emphasis in original); *see generally* 131 S. Ct. at 1225-1228.

The California Court of Appeal acknowledged that its decision conflicts with *Murphy* (Pet. App. 13a), which had characterized reasoning substantially the same as that of the Court of Appeal as "nonsensical." *Murphy*, 724 F.3d at 1226.[6] According to the Court of Appeal, "*Murphy*

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[6] The California Court of Appeal merely said that it found *Murphy* to be "unpersuasive," but its explanation – that a reasonable reader would not understand the phrase "the law of your state," to mean "federal law plus (nonfederal) state law" (*see* Pet. App. 13a) – slights the preemptive force of federal law and the FAA in particular. It also ignores the plain meaning of section 10 of the Customer Agreement.

The California Court of Appeal's criticisms of *Murphy* fail to respond to its central point that state rules preempted by the FAA never were "state law." *Murphy*, 724 F.3d at 1226. The *Murphy* court explained that federal law is part of the law of every state "as much as [every state's] own local laws and Constitution." *Id.* (internal quotation marks omitted), thus providing a basis for concluding that the parties did not intend state law to govern the enforceability of the arbitration clause if the state law contravened federal law. Thus, the *Murphy* court found it "nonsensical" that by agreeing that the "law of their state" would govern the agreement, the parties intended to mean "the law of their state without considering federal law." *Id.*

Contrary to the California court's misapphrension, the *Murphy* court did not "reason[ ] that contract interpretation is irrelevant because the parties are powerless to opt out of the FAA by contract . . " Pet. App. 13a-14a. Rather, the *Murphy* court expressly recognized that "if DirecTV had actually contracted with Plaintiffs to allow class arbitration,

(continued...)

provides no basis for concluding that the parties intended to use the phrase 'the law of your state'" to mean state law subject to the ordinary preemptive force of federal law. Pet. App. 13a. Instead, the Court of Appeal interpreted the phrase "the law of your state" to mean "the (nonfederal) law of your state without considering the preemptive effect, if any, of the FAA " Pet. App. 14a (emphasis added).

"The Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution." *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 157 (1982) (internal quotation marks omitted). When the Supreme Court holds that a state law is preempted, the state law is "*nullified* to the extent that it actually conflicts with federal law." *Id.* at 153 (emphasis added).

From a constitutional perspective, the FAA "has always preempted states from invalidating agreements that disallow class procedures."

(...continued)
it would be required to do so irrespective of *Concepcion*." *Murphy*, 724 F.3d at 1228. The parties, however, "did exactly the opposite" by agreeing to a class-action waiver. *Id.*

Murphy, 724 F.3d at 1226; *see also In re H & R Block Refund Anticipation Loan Litigation*, 59 F Supp. 3d 903 (N.D. Ill. 2014).

The California Court of Appeal's decision is also inconsistent with a federal district court decision in federal multidistrict litigation "that parallels the instant state court actions" (Pet. App. 12a), *In re DIRECTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, 810 F. Supp. 2d at 1071 (C.D. Cal. 2011), in which the court held that the reference to "the law of your state" in section 9 of the customer agreement could not mean that enforceability of the class action waiver should be determined exclusively under state law, because that would render "meaningless" section 10's general statement that the arbitration agreement is governed by the FAA.

Similarly, the court in *Meyer v. T-Mobile USA Inc.*, 836 F Supp. 2d 994 (N.D. Cal. 2011) reached the same conclusion as the *Murphy* court, holding that "[a]lthough the Supreme Court decided *Concepcion* after Plaintiff entered the 2008 Service Agreement, the Court must nonetheless apply *Concepcion* to its review of the agreement." *Id.* at 1001 ("[A]n intervening Supreme Court decision must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or

postdate announcement of the rule "
(internal quotation marks omitted)).

The California court's convoluted deconstruction of sections 9 and 10 of the Customer Agreement renders nugatory the parties' intent that their arbitration agreement "shall be governed by the [FAA] ." Customer Agreement § 10(b), JA129.

The California Court of Appeal construed the phrase "the law of your state" as though in the context of an arbitration agreement governed by the FAA the law of California was not preempted by federal law. Three federal courts – this Court in *Concepcion*, the Ninth Circuit in *Murphy*, and the District Court for the Central District of California in the *In re DIRECTV* multidistrict litigation, disagree, and so do *amici*.

The California court's decision in this case evinces a strong aversion to parties' rights to contract for individual arbitration and to contract out of class-wide arbitration. In essence, the decision below forces parties to consent to class-wide arbitration or risk invalidation of their agreement to arbitrate rather than litigate. In crafting an arbitration agreement:

> [P]arties may agree to limit the issues subject to arbitration, to arbitrate according to specific rules, and to limit

> *with whom* a party will arbitrate its disputes.
>
> The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.

Concepcion, 131 S. Ct. at 1748-49 (citations omitted, emphasis in original).

Compelled class arbitration defeats the parties' ability to tailor their arbitration agreement and undermines the FAA's core purpose of ensuring streamlined proceedings according to the parties' intent. *See Concepcion*, 131 S. Ct. at 1748 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and creates a scheme inconsistent with the FAA.").

This Court's decision in *Concepcion* rests on the conclusion that "class arbitration" is "not arbitration as envisioned by the FAA," because it lacks the speed and efficiency of individual arbitration, requires the burdens and "formality" of class-action litigation, and "greatly increases risks to defendants" given the magnified stakes and absence of meaningful judicial review. 131 S. Ct. at 1751-1753. Requiring parties who have agreed to arbitrate on an individual basis to arbitrate on

a class-wide basis as well as a precondition to availing themselves of the arbitral forum, this Court held, would "interfere[]" with the FAA's objective of "promot[ing] arbitration." *Concepcion*, 131 S. Ct. at 1749-1750.

Concepcion makes it clear that enforcement of a class arbitration waiver is essential to serve the FAA's mandate of preserving party autonomy in the crafting of informal and expeditious procedures for the private resolution of *individual* disputes. *See Concepcion*, 131 S. Ct. at 1749.[7] "[C]ourts must 'rigorously enforce' arbitration agreements according to their terms, including terms that 'specify *with whom* [the parties] choose to arbitrate their disputes' " *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013) (emphasis in original, internal citation omitted); *see also Stolt-Nielsen*, 559 U.S. at 683. There is a

[7] Limited "procedural" challenges to a class action waiver may survive *Concepcion*. *See Concepcion*, 131 S. Ct. at 1750 n.6 ("States remain free to take steps addressing the concerns that attend contracts of adhesion – for example, requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted. Such steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms."). This case does not fall within this exception.

fundamental difference between bilateral arbitration and class-action arbitration. *Concepcion*, 131 S. Ct. at 1750; *see also Stolt-Nielsen*, 559 U.S. at 686.[8]

The California court's decision in this case is not a faithful application of federal arbitration law and exhibits the continued "judicial hostility towards arbitration" that the FAA was intended to foreclose, *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (*per curiam*), quoting *Concepcion*, 131 S. Ct. at

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[8] "Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes." *Concepcion*, 131 S. Ct. at 1750. This Court has cautioned in the context of judicial class actions, not arbitration, that class actions may exert pressure on defendants to settle weak claims. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007).

One scholarly article states that "[t]he percentage of certified class actions terminated by a class settlement ranged from 62% to 100%, while settlement rates (including stipulated dismissals) for cases not certified ranged from 20% to 30%." Thomas E. Willging *et al.*, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. Rev. 74, 143 (1996); *see also* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1873 (2006) ("[C]lass certification operates most disturbingly when the underlying merits of class members' claims are most dubious.") The same pressure to settle would be felt if class-wide arbitration were imposed.

1745, 1747, 1757; *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

Amici urge this Court to instruct state courts once again that they cannot avoid or circumvent the overriding federal policy favoring arbitration or impose conditions on arbitration agreements incompatible with the federal policy favoring efficient arbitration processes by drawing on state law and relying on sophistic reasoning such as that employed by the California court below.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the California courts.

Respectfully submitted,

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June 5, 2015